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No. 90-1770

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

THE STATE OF TEXAS,
Petitioner

V.

TIMOTHY LANE GRIBBLE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE EIGHTH AMENDMENT REQUIRES THE JURY TO CONSIDER AND GIVE EFFECT TO MITIGATING EVIDENCE REGARDLESS OF WHETHER THE EVIDENCE PROVIDES A CAUSAL EXPLANATION FOR THE CRIME.

II. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS CORRECTLY DECIDED THAT THE JURY DID NOT HAVE A VEHICLE FOR EXPRESSING ITS REASONED MORAL RESPONSE TO CONSTITUTIONALLY MITIGATING EVIDENCE OF TROUBLED CHILDHOOD, GOOD CHARACTER AND CHRONIC MENTAL INSTABILITY WHEN DECIDING WHETHER MR. GRIBBLE SHOULD LIVE OR DIE.

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I.

STATEMENT OF THE CASE

A. Statement of Facts

A concise statement of the mitigating evidence presented at Mr. Gribble's trial is set forth in the opinion of the Texas Court of Criminal Appeals:

> In the instant cause, testimony offered by appellant revealed a troubled and insecure childhood in which his mother was institutionalized for a severe mental illness and his father imprisoned for burglary. Only an infant at the time, appellant suffered greater mental and emotional hardship as a result of these traumatic events than did his

older siblings. During the first several years of his life, he and the other children were shuffled among relatives, never living in one place for very long.

After his parents were released from their respective confinements, appellant lived for a time with his mother. She had since divorced his father and remarried, living with her new husband and the children in a shack without running water somewhere in the mountains of Tennessee. Within a few months, appellant's step-father disappeared, leaving his mother pregnant and without food for the two youngest children. Unable to care for her family, appellant's mother spent much of her time in bars, often bringing strange men home at night. During his early formative years, there was no responsible adult figure in appellant's life.

Largely as a result of these circumstances, appellant's own mental and emotional condition was, and remained at the time of trial, abnormal. Doctor William Winslade, a psychoanalyst, testified that after much effort on his part he persuaded appellant to disclose to him that on two occasions appellant's mother had sexually abused appellant as a small child, requiring him to perform oral sex on her. Finally, Dr. Winslade opined that those experiences, even if they were untrue fantasies, provided a substantial explanation for the appellant's subsequent history of violence, and how the contrast of his violent behavior with his positive personality traits were indicative of severe mental illness, depression, and psychotic illusions of the kind experienced by his mother. Dr. Winslade concluded that appellant developed a delusive fear of sexual domination, and that throughout his adult life this fear intermittently erupted into acts of violence, which appellant forced upon women that, in his fantasies, he feared they might force upon him. Invariably his victims were women with whom he was acquainted on a casual basis and, following his sexual assaults upon them, he customarily acted with incongruous, even bizarre, familiarity, more characteristic of an intimate encounter than a brutal attack.

That he was able to keep these sexual aberrations secret from his family and friends over an extended period of time evinces a personal recognition of his abnormalcy. Virtually all persons with whom he was acquainted, including his teachers, the customers at his natural father's service station, where he worked, his wife and ex-wife, and his siblings, regarded him as a stable, sensible, hardworking, polite, and generous. But at times his sexual fantasies became too great to resist, especially when he was under the influence of alcohol or other drugs. At such times, he suffered from a true psychosis in which episodes of violent criminal behavior were typically followed by feelings of

intense remorse.

Petitioner's Appendix A at A 20-22.

B. Disposition Below

Based on the facts presented in mitigation of a sentence of death, the Texas Court of Criminal Appeals concluded that the jury was unable to consider and give effect to this mitigating evidence. The Texas Court, therefore, reversed Mr. Gribble's conviction and sentence. See Id. The Court of Criminal Appeals denied the State's Motion for Rehearing. See Petitioner's Appendix B.

II.

REASONS FOR DENYING THE WRIT

A. THIS COURT IS WITHOUT JURISDICTION TO CONSIDER THE PROPOSED QUESTIONS BECAUSE THEY WERE NOT PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

None of the claims presented here were presented to the Court below. Therefore, none are appropriately before this Court. The State presents three questions on which it asks this Court to grant certiorari: whether character and background evidence must relate to the accused's culpability for the crime and capacity for rehabilitation before the evidence is mitigating under the Eighth Amendment; whether the first special issue under the Texas capital punishment sentencing scheme was sufficient for the jury to consider what the State views as Mr. Gribble's only piece of mitigating evidence; and, whether character and background evidence is mitigating if the crime cannot be

attributed to the evidence.

On direct appeal, the State advanced none of these arguments. Instead, it argued that Mr. Gribble was not entitled to additional jury instructions all of his mitigating evidence could be considered within the two special issues. The State's entire argument was framed by its perception of the requirements of Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989). Acknowledging that Mr. Gribble's evidence regarding his troubled childhood, good character, and chronic mental instability was constitutionally mitigating, the State argued that "these types of factors fit easily -- just as they always have -- into the jury's deliberations on the two special issues."[1]

The arguments presented by the State here were not presented on direct appeal. Indeed, the arguments advanced here are the opposite of the arguments made on direct appeal. On direct appeal the State conceded that Mr. Gribble's evidence was constitutionally mitigating and argued only that it could be considered within the special issues. Here, in contrast, the State argues that virtually none of Mr. Gribble's evidence is even mitigating.

To address any of the State's claims would be antithetical to the fundamental policy of refusing to review federal questions unless they have been both raised and decided in the court below. See, e.g., Heath v. Alabama, 474 U.S. 82, 87 (1985); Illinois v.

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[1] The relevant portion of the State's brief on direct appeal is attached as Appendix A.

Gates, 462 U.S. 213, 218-22 (1983); Tacon v. Arizona, 410 U.S. 351, 352 (1973); Hill v. California, 401 U.S. 797, 805-06 (1971); Cardinale v. Louisiana, 394 U.S. 437-39 (1969) (federal question not raised and decided below defeats Supreme Court jurisdiction). Even assuming that a federal question is derivative of a ground raised on direct appeal,

> [w]hen the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Board of Directors of Rotary Int'l v. Rotary Club, 431 U.S. 537, 550 (1987) and cases cited therein. Absent an opportunity for the state court to address the State's new claims as to whether Mr. Gribble's evidence was mitigating in the first place, certiorari review would be improper.

In an apparent attempt to create a jurisdictional basis for this Court to review the lower court's ruling, the Attorney General, on a motion for rehearing, asserted the claims it now presents in its petition for certiorari. This does not satisfy the requirement of initial state court review of claims not raised on appeal. The Court of Criminal Appeals will not entertain a motion for rehearing which "belatedly present[s] new grounds in a piecemeal fashion" because it is "inimical to the rights of an opposing party and valid interests of this Court in orderly procedure and judicial economy." Gambill v. State, 692 S.W.2d 105, 106 (Tex. Crim. App. 1985). Accordingly, the Court of Criminal Appeals' summary denial of rehearing in Gribble

indicates that the motion was not entertained by the state court in a manner adequate to invoke this Court's consideration of the claims now raised.

Presenting a federal question for the first time in a motion for rehearing addressed to the highest state court is insufficient to invoke Supreme Court jurisdiction unless the court below actually entertains the petition and expressly decides the motion. Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945); Hanson v. Deckla, 357 U.S. 235, 243-44 (1958); Herndon v. Georgia, 295 U.S. 441, 443 (1935); American Surety Co. v. Baldwin, 287 U.S. 156 (1932); Forbes v. State Council, 216 U.S. 396 (1910); Simmerman v. Nebraska, 116 U.S. 54 (1885). To merit certiorari review, the order denying the motion for rehearing must be more than a cursory recitation that the motion has been considered and then denied; there must be language in the order that in some way reflects that the court "exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition." Radio Station WOW, 326 U.S. at 128; Hathorn v. Lovorn, 457 U.S. 255, 265 n.15 (1982). Because the Court of Criminal Appeals denied the State's motion for rehearing without comment (see Petitioner's Appendix B), the State cannot rely on that motion as a predicate to this Court's certiorari jurisdiction.

B. THE QUESTIONS SUGGESTED FOR REVIEW PRESENT NO SPECIAL OR IMPORTANT ISSUES.

Rule 10 of the Supreme Court Rules provides that review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only on a showing of "special and important reasons." To merit certiorari review, the reasons advanced by petitioner must relate to problems "beyond the academic and episodic." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955).

In its opinion below, the Texas Court applied Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989), to qualitatively similar mitigating facts, i.e., facts to which the jury could not fully consider and or to which it could give effect under the court's charge. The Texas Court held than, as in penry, Mr. Gribble's conviction and sentence had to be reversed. Essentially, all the State now asks is that this Court ignore the lower court's findings of fact and reach a different result. This does not constitute a special or important reason to justify this Court's imposition of its certiorari jurisdiction, and none exist.

C. WHETHER THE EIGHTH AMENDMENT REQUIRES THE JURY TO CONSIDER AND GIVE EFFECT TO MITIGATING EVIDENCE REGARDLESS OF WHETHER THE EVIDENCE PROVIDES A CAUSAL EXPLANATION FOR THE CRIME.

In Boyde v. California, 494 U.S. ___, 108 L.Ed.2d 316 (1990) this Court confirmed that constitutional mitigating evidence is not limited to crime related evidence, or evidence showing a potential for rehabilitation. In Boyde, this Court upheld the

California capital punishment jury instructions precisely because they did not preclude the jury's consideration of mitigating evidence that was not linked to the commission of the crime:

> Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation. Other factors listed in [the statute] allow for consideration of mitigating evidence not associated with the crime itself, such as the absence of prior criminal activity by a defendant, the absence of prior felony convictions, and youth. When [the challenged instruction] is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime-related evidence.

Id. at 331 (emphasis added).[2]

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[2] Boyde, therefore contradicts, rather than supports, the State's restrictive view of mitigating evidence. Contrary to the State's argument, no confusion has ever existed regarding the nature of constitutionally mitigating evidence, and the State's reliance on California v. Brown, 479 U.S. 538 (1987) (O'Connor concurring) is misplaced. To the extent that Brown's language suggests that, in order to be mitigating, the crime had to be attributable to the defendant's background and character, Boyde clarifies this language. In Boyde, this Court held that the evidence of impoverished and deprived childhood, inadequacies as a student and strength of character was mitigating evidence which the jury was "directed to consider" in the context of an instruction regarding "any other circumstance that might excuse the crime." 108 L.Ed.2d at 330 (emphasis in original). Although this evidence did not link the defendant's commission of the crime to his background and character, it was still constitutionally mitigating.

Nonetheless, the State still attempts to backtrack from Penry and Boyde by relying on Justice O'Connor's concurrence in Brown. The State alleges that Justice O'Connor only regards a defendant's background and character as constitutionally relevant when it "pertains to an aspect of a defendant's character or background that society views as rendering him less culpable for the crime" and when a "nexus" exists between the evidence and the crime. Petition at 20. In addition to this Court's holding in Boyde, Justice O'Connor's own remarks in South Carolina v. Gathers, reveal the flaws of the State's attempt:

(continued...)

The petitioner in Boyde contended that "none of the 11 statutory factors in [the California sentencing statute] allowed the jury to consider non-crime-related factors, such as his background and character, which might provide a basis for a sentence less than death." Id. at 330. The Court rejected Boyde's claim because it determined that the jury could consider non-crime-related mitigating evidence under the challenged instruction, not because the non-crime-related evidence itself was not constitutionally protected. Respondent's selective citation of footnotes[3] should not distract this Court from its

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[2](...continued)

> Our decisions in Lockett and Eddings were based on the proposition that the decision of the capital sentencer is a profoundly moral one. . . . Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so. . . . In this case, the sentencing jury heard testimony from [the defendant's] mother, his sister, and his cousin, all indicating that he was an affectionate and caring person. Gathers' sixth grade teacher testified that he was a quiet and affectionate child. . . . None of this evidence was directly relevant to the events of September 13, 1986, but all of it was relevant to the jury's assessment of the defendant and his moral blameworthiness.

___ U.S. ___, ___; 109 S.Ct. 2207, 2214 (1989) (O'Connor, J., dissenting on other grounds) (emphasis added).

[3] For example, the State claims that Boyde, at n.5, limits non-crime-related mitigating evidence to good character evidence. Petition at 20 n.5. Footnote five says no such thing. This Court's point in footnote five was to explain that through the catch-all mitigation instruction the jury could consider and give effect to good character evidence. By any rational view, this does not limit the constitutional dimensions of non-crime-related mitigating evidence. Rather, it merely recognizes that this type of evidence, like other constitutionally protected mitigating evidence unrelated to the crime, could be considered under the California jury instructions. As the Court of Criminal (continued...)

holding in Boyde: the California statute was constitutional because it provided the jury what the Texas statute does not -- a vehicle for considering and giving full effect to all mitigating evidence, both crime-related and non-crime-related.[4]

Skipper v. South Carolina, 476 U.S. 1 (1986), also illustrates this broad conception of constitutionally mitigation evidence. Skipper held that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature [mitigating evidence] relevant to the sentencing determination." 476 U.S. at 7. Such evidence does not render the defendant less morally culpable for his crime, nor does it have any imaginable nexus

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[3](...continued)
Appeals recognized in Gribble, Mr. Gribble's jury did not have that opportunity in the first place. See infra at ___.

[4] Saffle v. Parks, ___ U.S. ___ (1990), 108 L.Ed.2d 415 (1990) offers no support to the State's articulation of mitigating evidence. In Saffle this Court held that a claim instructing the jury to avoid the influence of sympathy was barred by Teague v. Lane, 489 U.S. ___, 106 L.Ed.2d (1989). In reaching this holding the Court affirmed that "Lockett and Eddings command that the State must allow the jury to give effect to mitigating evidence in making the sentencing decision." Saffle, 108 L.Ed.2d at 426.

Saffle does not, as the State would have it, stand for the proposition that if the jury is permitted to consider any mitigating evidence, it creates a risk that the jury decision will be based on mere sympathy. Rather, Saffle holds that the dictates of Lockett and Eddings do not require the jury to be allowed to base its decision on mere sympathy. Saffle recognizes, once again, that the jury must be able to consider, weigh, and give effect to all of the mitigating evidence that the defendant puts before the jury. Id. at 426. See also and compare Penry, 106 L.Ed.2d at 284 ("Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned moral response to the defendant's background, character, and crime.").

with the crime itself. Nonetheless, the Court recognized that

> Although it is true that [prison adjustment] ... would not relate specifically to petitioner's culpability for the crime he committed, see Koon I, supra, 278 S.C., at 536, 298 S.E.2d, at 774, there is no question but that such [evidence] ... would be "mitigating" in the sense that [it] might serve "as a basis for a sentence less than death." Lockett, supra, 438 U.S. at 604, 98 S.Ct. at 2965.

Id. at 4-5. The Court acknowledged that evidence of successful adjustment to prison life is mitigating not only because it militates against a finding of future dangerousness, but also because it shows that the defendant "could lead a useful life behind bars if sentenced to life imprisonment." Id. at 7 (emphasis added). This Court nevertheless held that such evidence is constitutionally mitigating and that the sentencer must consider it, because it informs the decision required by the Eighth Amendment whether death is the appropriate sentence for such a defendant. Skipper, 476 U.S. at 4-5, 7-8. Skipper, therefore, squarely forecloses Petitioner's argument.

Boyde and Skipper flow from a firmly established line of cases beginning with Woodson v. North Carolina, 428 U.S. 280 (1976), in which this Court has affirmed the broad constitutional parameters of mitigating evidence. The State's attempt to create a conflict among these decisions, or a "confusion engendered by Penry v. Lynaugh," Petition at 17, is nothing more than an attempt to apply an unjustifiably, and unconstitutionally, narrow definition of mitigating evidence.[5] Each of the State's reasons

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[5] The State's fixation on the concepts of "personal culpability for the crime" and "potential for rehabilitation" (continued...)

for granting the writ is infected by its argument that the Eighth Amendment protects only a narrow set of mitigating evidence which shows personal culpability for the crime or a potential for rehabilitation. This position reveals a fundamental misunderstanding of the Eighth Amendment principles consistently applied by this Court.

In an uninterrupted line of cases, this Court has steadfastly refused to permit constitutional limitations on the presentation and consideration of mitigating evidence at the sentencing phase of a capital trial. See Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976); Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977); Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v.

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[5](...continued)
stems, most accurately, from a desire to ignore the import of Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989). Both concepts betray themselves as mere cognates for the operative terms of the Texas special issues. With respect to the first special issue, "personal culpability for the crime" stands in for "deliberately," while in the second special issue, "potential for rehabilitation" substitutes for future dangerousness. Under this crabbed view, if mitigating evidence must relate to one of these factors, then all mitigating evidence can be considered within the scope of the special issues. This Court's holding in Penry, therefore, would be superfluous. Even the Texas Legislature has recognized the fallacy of this view -- in May 1991 the legislature adopted, and sent to the governor, a new capital punishment scheme which modifies the special issue questions by adding a third question: "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without the possibility of parole rather than a death sentence be imposed." A copy of the Senate Bill No. 880 is attached as Appendix B.

Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986); Sumner v. Shuman, 483 U.S. 66 (1987); McCleskey v. Kemp, 481 U.S. 279 (1987); Hitchcock v. Dugger, 481 U.S. 393 (1987); Franklin v. Lynaugh, 487 U.S. 164 (1988); Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989); McKoy v. North Carolina, 494 U.S. ___, 108 L.Ed.2d 369 (1990); Boyde v. California, 494 U.S. ___, 108 L.Ed.2d 316 (1990).

This Court has based the constitutional requirement of individualized sentencing on the indisputable fact that the consequences of the jury's momentous decision in a capital case are profoundly different than in a non-capital one. Woodson, 428 U.S. at 303-304. The Court has emphasized "what cannot fairly be denied" -- the insight that "death is a punishment different from all other sanctions in kind rather than degree." Id. (emphasis added; citing Furman v. Georgia, 408 U.S. 238, 286-291 (1972)). A more detailed examination of the Court's explanation illustrates this bedrock principle:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Woodson, 428 U.S. at 304 (emphasis added).

This passage makes apparent that this Court in Woodson did not mandate individualized sentencing because it comports with

traditional aims of sentencing generally in non-capital cases. On the contrary, this Court emphasized that the "ultimate" nature of the penalty required that the jury weigh all aspects of the defendant's character and record so that it might determine whether this "uniquely individual" human being should be put to death.

Moreover, this Court's use of the disjunctive in its description of potentially mitigating evidence was no accident. This Court did not hold that "the relevant facets of the character and record of the individual offender" had to be tied in any way to the defendant's personal culpability for the crime in order to mitigate against the imposition of death. On the contrary, in Woodson this Court specifically rejected any such requirement:

> Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development [citations omitted]. While the prevailing practice of individualized sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see Trop v. Dulles, 356 U.S. at 100, 2 L.Ed.2d 630, 78 S.Ct. 590 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Id. This Court held that "[c]onsideration of both the offender and the offense" is constitutionally required before the death penalty may be imposed. By this distinction, the Court intended that the jury consider both the circumstances of the offense (including the relationship between any mitigating evidence and

the commission of the offense) and the character and record of the individual offender (exclusive of the relationship, if any, between this evidence and the commission of the offense) before it may condemn the offender to die. Any other process would require the jury to ignore "the diverse frailties of humankind." Id. Woodson, itself, demonstrates that any claim that all constitutionally mitigating evidence must reflect reduced personal culpability for the capital murder is flatly wrong.

A year after Woodson, this Court emphasized this identical distinction between mitigating evidence which is relevant to the crime and that which is relevant to the individual defendant's character, holding again that neither could be excluded from the jury's consideration. Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 (1977). Striking down a mandatory death penalty for persons convicted of murdering police officers, the Court repeated that "it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." Id. The Court's "either-or" analysis of mitigation in Roberts reaffirmed its opinion in Woodson, and refutes any argument that mitigating evidence must be tied to the commission of the crime.

Having established the requirement of individualized sentencing in Woodson and endorsed that principle again in Roberts (Harry), this Court in 1978 rejected once and for all the claim that a State could limit the presentation and consideration

of constitutionally mitigating evidence in a capital case. Lockett v. Ohio, 438 U.S. 586 (1978). Lockett invalidated an Ohio statute that limited the mitigating circumstances a jury could consider in deciding whether a defendant convicted of capital murder should suffer death. 438 U.S. at 607-609. This Court emphasized again that its holding in Woodson that "the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense" "rested 'on the predicate that the penalty of death is qualitatively different' from any other sentence." Lockett, 438 U.S. at 604 (citations omitted).[6] The Court explicitly concluded "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case,[7] not

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[6] The Court stressed that "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases [due to the] nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence. . . ," and concluded that precluding the sentencer "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S. at 605 (emphasis added).

[7] In Lockett, the Court reserved judgment whether a mandatory death sentence constitutionally might be imposed on prisoners or escapees convicted of murder committed while serving a life sentence. See Lockett, 438 U.S. at 604 n.11. This question was subsequently resolved in the negative. Sumner v. Shuman, 483 U.S. 66 (1987).

be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. (emphasis added in part).

It is not the possible relationship between mitigating circumstances and the capital offense that demands that the jury consider it in passing sentence; instead, it is the nature of the "ultimate" penalty and the "fundamental respect for humanity underlying the Eighth Amendment" that require that mitigating evidence be heard and considered. To vindicate that fundamental respect for humanity, the Constitution requires the sentencer to consider all the aspects of an individual's character, whether or not that evidence is also related to the commission of a capital offense. As this Court recognized,

> [I]n noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes . . . . Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases [to satisfy the Eighth Amendment].

Lockett, 438 U.S. at 604-605.

Since this Court articulated the constitutional requirement of a broad conception of mitigating evidence in Lockett, it has uniformly reaffirmed that formulation. This unbroken line of decisions demonstrates that a defendant need not establish any "nexus" between his mitigating evidence and the commission of the capital offense before he is entitled to have the sentencer consider it in passing sentence. Instead, the jury must be

permitted to consider and give effect to any mitigating circumstance that might reasonably persuade it to decline to impose a sentence of death.

In Sumner v. Shuman, the Court reaffirmed the Eighth Amendment requirement of individualized sentencing in capital cases that it had recognized in Woodson and elaborated in Lockett. Shuman, 483 U.S. 66 (1987). Shuman struck down a Nevada statute mandating that any life-term inmate convicted of committing murder during that life term be sentenced to death without further inquiry. 483 U.S. at 78. The Court traced its capital sentencing jurisprudence from Gregg v. Georgia, 428 U.S. 153 (1976) forward and concluded that constitutional capital sentencing schemes must permit "the sentencing authority to consider relevant mitigating circumstances pertaining to the offense and a range of factors about the defendant as an individual," no matter how aggravated the homicide. Shuman, 483 U.S. at 74 (emphasis added). This phrase highlights the flaw in the claim that mitigating evidence must be tied to the capital offense and render the defendant less morally culpable than any other citizen. On the contrary, Shuman demonstrates that the Eighth Amendment's requirement of individualized sentencing continues to be grounded in fundamental respect for the lives of individual human beings, rather than on some vague degree of causal relationship between the mitigating evidence and the capital offense.

This Court has summarized the central commands of its Eighth

Amendment capital sentencing jurisprudence since Gregg as follows:

> In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence. . . . [a State] cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty.

McCleskey v. Kemp, 481 U.S. 279, 304, 306 (1987) (emphasis in original in part and supplied in part). In other words, the Constitution requires that a State meaningfully narrow the class of convicted murderers eligible for the death penalty, but forbids the State from limiting in any manner whatsoever the sentencer's consideration of "any relevant circumstance that could cause it to decline to impose" a sentence of death on those so convicted. Id; see also 481 U.S. at 367 (Stevens, J., dissenting); Zant v. Stephens, 462 U.S. 862, 870-872 (1983) (approving Georgia statutory scheme conferring "absolute discretion [on] the factfinder" not to impose death after the eligibility of the defendant for a death sentence has been established by the finding of aggravating circumstances).

In 1989 this Court applied its long held understanding of the broad constitutional dimensions of mitigating evidence to the Texas capital punishment statute. Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989). Penry reaffirmed the Eighth Amendment principle that "the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's

background, character, or the circumstances of the crime" in determining the appropriateness of a death sentence. 106 L.Ed.2d at 284. Accordingly, Penry held the Texas statute unconstitutional, as applied, if a rational juror, in answering the special issues, could not give "full consideration to evidence that mitigates against the death penalty." Id. This Court held that it was constitutionally necessary for jurors to be given a "vehicle for expressing the view that [the defendant] did not deserve to be sentenced to death based upon his mitigating evidence." Id. at 283.

Contrary to the teaching of this Court, from Woodson to Boyde, the State is trying to do exactly what it cannot: prevent the jury from giving effet to constitutionally protected mitigating evidence. Moreover, it is seeking to enlist this Court in its efforts, despite the repeatedly and firmly expressed opinion of this Court that the jury in a capital case may not be so restricted. Certiorari should be denied.

D. THE TEXAS COURT OF CRIMINAL APPEALS CORRECTLY DECIDED THAT THE JURY DID NOT HAVE A VEHICLE FOR EXPRESSING ITS REASONED MORAL RESPONSE TO CONSTITUTIONALLY MITIGATING EVIDENCE OF TROUBLED CHILDHOOD, GOOD CHARACTER AND CHRONIC MENTAL INSTABILITY WHEN DECIDING WHETHER MR. GRIBBLE SHOULD LIVE OR DIE.

The Texas Court of Criminal Appeals fully considered and correctly applied this Court's holding in Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989) to the particular facts of Mr. Gribble's case. To reach its desired result, the State would have this Court rewrite the facts and apply an unconstitutional definition of mitigating evidence. Because the Texas Court correctly held that the jury did not have a vehicle for expressing its reasoned moral response to constitutionally mitigating evidence of troubled childhood, character and mental instability, certiorari should not be granted.

In Penry, this Court recognized that in certain cases, the Texas capital punishment special issue questions unconstitutionally preclude jurors from considering and giving effect to mitigating evidence. Given that the Eighth Amendment requires that a capital sentencing jury may not be precluded "'from considering any aspect of the defendant's character or any circumstance of his offense as an independently mitigating factor,'" Penry, 106 L.Ed.2d at 277 (quoting Lockett v. Ohio, 438 U.S. at 607) (emphasis supplied), the Constitution demands that the jury have a vehicle for giving effect to mitigating evidence "by declining to impose the death penalty." Penry, 106 L.Ed.2d at 284.

Penry invalidated the death sentence of a defendant whose

mitigating evidence included mental retardation and child abuse. At sentencing, Penry's jury answered the two standard special issue questions: one on "deliberateness" and another on future dangerousness.[8] This Court held that the inherent limitations of the "special issues" precluded jurors from considering and giving full mitigating effect to the particular evidence in Penry's case.

In analyzing whether the first special issue allowed full consideration of Penry's mitigating evidence, this Court acknowledged that his evidence of child abuse and mental retardation was relevant to "whether he was capable of acting 'deliberately'" Id. at 280. The Court, however, recognized that the relevance of this evidence to Penry's sentence was not exhausted by its relevance to his "deliberateness;" that is, the evidence "had relevance to [his] moral culpability beyond the scope of the [first question]." Id.

As the Court explained, the first special issue did not permit full consideration of Penry's mitigating evidence because "personal culpability is not solely a function of a defendant's capacity to act 'deliberately.'" Id. In fact, the very nature

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[8] Under Art. 37.071(b)(1) and (b)(2), the two special issues require the jury to determine: (1) "[W]hether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; and (2) "[W]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The jury in Penry also answered the third special issue regarding the provocation of the deceased. The third special issue was not presented to the jury in this case.

of the first special issue demonstrates why it cannot fully measure a defendant's culpability. Under Texas law, the first special issue requires the jury to find only a "moment of deliberation and the determination on the part of the actor to kill." Cannon v. State, 691 S.W.2d 664, 677 (Tex. Crim. App. 1985). The first special issue thus focuses solely on the defendant's mens rea at a single instant in time: it requires the jurors to inquire only whether, as a matter of fact, deliberation occurred.

Because the first issue focuses only on the fact of deliberation, it precludes jurors from considering many other mitigating factors which may have influenced or preceded that fact of deliberation. For example, in answering this special issue, jurors cannot consider potentially mitigating explanations regarding why the defendant acted deliberately e.g., that his ability to judge the consequences of his actions was temporarily, though perhaps not completely, impaired. Nor, in answering this special issue, can jurors consider whether the defendant was able to control his impulses. In sum, as this Court recognized in Penry, even if a defendant acts "deliberately," he may still be less culpable (and less deserving of death) because some mitigating fact explains that deliberate act.

This Court acknowledged that Penry's evidence of retardation and child abuse lessened his culpability because it indicated he was "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." Id. at 281. The

Court concluded that the narrow focus of the first special issue precluded jurors from giving Penry's evidence full mitigating effect. The first special issue precluded a rational juror from giving a life sentence, even though that juror could have concluded a life sentence was the "reasoned moral response" to Penry and his evidence:

> [A] juror who believed that Penry's ... background diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime 'deliberately.' Thus, we cannot be sure that the jury's answer to the first special issue reflected a 'reasoned moral response' to Penry's mitigating evidence.

Id. The Court held that this preclusive effect violated the Eighth Amendment.

In evaluating whether the second special issue allowed full consideration of Penry's evidence, this Court observed that Penry's retardation and abused childhood was "relevant only as an aggravating factor" because it compelled "a 'yes' answer to the question of future dangerousness." Id. at 281 (emphasis in original). The Court explained that the second special issue prevented jurors from considering Mr. Penry's evidence as mitigating evidence:

> Penry's . . . history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future . . . . The second special issue, therefore, did not provide a vehicle for the jury to give mitigating effect to Penry's evidence . . . .

Id. See also Zant v. Stephens, 462 U.S. 862, 885 (1983) (constitution forbids State to convert mitigating evidence into

aggravating evidence).

Penry reaffirms the longstanding Eighth Amendment principle that "the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime" in determining the appropriateness of a death sentence. 106 L.Ed.2d at 284. Accordingly, Penry holds the Texas statute unconstitutional, as applied, if a rational juror, in answering the special issues, could not give "full consideration of evidence that mitigates against the death penalty." Id. The jurors must be given a "vehicle for expressing the view that [the defendant] did not deserve to be sentenced to death based upon his mitigating evidence." Id. at 283. In such cases, Penry requires "instructions informing the jury that it [may] consider and give effect to the mitigating evidence . . . by declining to impose the death penalty." Id. at 284. (emphasis supplied).[9]

The Texas Court of Criminal Appeals correctly applied Penry to Mr. Gribble's mitigating evidence. In the court's words:

> [A]t least whenever a capital defendant produces evidence of his own character, background, or the circumstances surrounding his offense which, according to contemporary social standards, has a tendency to reduce his moral culpability in a way not exclusively related to the deliberateness of his criminal conduct, the provocative

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[9] As the Court explained, the Constitution mandates that jurors be given wide latitude in giving effect to their conclusion that a defendant ought not be executed. "Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned moral response to the defendant's background, character, and crime." Id. at 284.

> behavior of his victim, or the probability of his future dangerousness, the United States Constitution forbids imposition of the death penalty upon him by a sentence given no means to prescribe, based on such mitigating evidence, a less severe punishment.

Opinion of Court of Criminal Appeals, Petitioner's Appendix A at A-20.

As the Texas Court found, the testimony at trial revealed a troubled and insecure childhood racked by poverty and scarred by absent and delinquent or emotionally unstable parents. Supra at 2-3. This included a mother, who, when she was present, sexually abused her young son, requiring him to perform oral sex on her. Id. As the Court concluded, "During his formative years, there was no responsible adult figure in [Mr. Gribble's] life." Id.

Mr. Gribble's mitigating evidence was not limited to his childhood experiences but extended to the effects on him as an adult. The Court continued, "largely as a result of these circumstances, [Mr. Gribble's] own mental and emotional condition was, and remained at the time of trial, abnormal." Id. A psychoanalyst explained, "those experiences, even if they were untrue fantasies, provided a substantial explanation for [Mr. Gribble's] subsequent history of violence, and how the contrast of his violent behavior with his positive personality traits were indicative of severe mental illness, depression, and psychotic illusions of the kind experienced by his mother." Id.[10]

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[10] Even if, as the State argues, a nexus is required between the mitigating evidence and the commission of the crime, the facts found by the Texas Court regarding the psychiatrist's explanation of Mr. Gribble's history, provides that connection. (continued...)

> Despite his debilitating childhood, and his own personal recognition of his abnormalcy[,] [v]irtually all persons with whom he was acquainted, including his teachers, the customers at his natural father's service station, where he worked, his wife and ex-wife, and his siblings, regarded him as a stable, sensible, hardworking, polite, and generous. But at times his sexual fantasies became too great to resist, especially when he was under the influence of alcohol or other drugs. At such times, he suffered from a true psychosis in which episodes of violent criminal behavior were typically followed by feelings of intense remorse.

Id.

The Texas Court recognized this multi-dimensional mitigating evidence of troubled childhood, good character and mental instability, as "redeeming personality traits or factors which tend to ameliorate fault." Id. "As such, the sentencer in a capital proceeding must be authorized to mitigate punishment if it finds that a defendant's personal culpability was thereby reduced." Id. The Court held, therefore, that "absent some functionally equivalent instructive device [to the court's charge], that the jury could consider and give effect to the mitigating circumstances, the jury was not afforded the opportunity to express its judgment whether [Mr. Gribble], even if likely to be a continuing threat to society, should receive the death sentence." Id.

To escape the decision by the Texas Court, which faithfully applied Penry to the mitigating facts of this case, the State

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[10](...continued)
The State does not contest the accuracy of these facts, nor can it because the Texas Court's findings of fact may not be overruled unless clearly erroneous, which they are not.

would have this Court rewrite the facts as found be the court below. First, it claims that the only mitigating evidence this could should consider is that of an "inability to control his fantasies, thoughts and fears." Petition at 21. Second, it baldly asserts that the Court of Criminal Appeals "mischaracterized" the evidence of Mr. Gribble's childhood. Petition at 26.

This Court does not grant certiorari to "review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). The findings of mitigating facts by the Texas Court are fully supported by the record and therefore, this Court should reject the State's attempt to have them rewritten. Simply because the State does not like the findings of fact made by the Texas court does not provide a reason to grant certiorari.

The State's argument -- that the only constitutionally relevant mitigating evidence is that of an inability to control fantasies, thought and fears all of which could be considered within the scope of special issue one -- stems from a faulty premise. The premise is that constitutionally mitigating evidence must be relevant to personal culpability for the crime or the potential for rehabilitation. The fallacy of that view is demonstrated not only by this Court's statements regarding the constitutional scope of mitigating evidence, see supra at ___ - ___, but also by the specific evidence held to be constitutionally protected mitigating evidence in each of those cases. See, e.g., Lockett v. Ohio, 438 U.S. 586, 604 (1978)

(plurality opinion) (mitigating factors include character, absence of prior record, youth, low intelligence, and drug rehabilitation); Eddings v. Oklahoma, 455 U.S. 104, 113-116 (1982) (evidence of "difficult family history," "turbulent family history," "beatings," "youth," and "depriv[ation] of the care, concern, and paternal attention that children deserve" all mitigating under the Eighth Amendment); Skipper, 476 U.S. 1 (1986) (adjusting well to prison life constitutionally mitigating evidence relevant to dangerousness and ability to lead useful life behind bars); California v. Brown, 479 U.S. 538 (1987) (evidence of "disadvantaged background" constitutionally mitigating); Hitchcock v. Dugger, 481 U.S. 393, 397 (1987) (evidence of impoverished childhood, early death of father, youth and "the difficult circumstances of [the defendant's] upbringing," all constitutionally mitigating); Burger v. Kemp, 483 U.S. 776, 97 L.Ed.2d 638, 654 (1987) ("unhappy and unstable childhood," characterized by a succession of stepfathers who resented the defendant and a mother who failed to supervise or care for the defendant, constitutionally mitigating); Boyde, 108 L.Ed.2d at 330 (jury instructions allowed consideration of mitigating evidence of "impoverished and deprived childhood, inadequacies as a school student, strength of character in face of these obstacles"). If the State's analysis of what constitutes mitigating evidence within the Eighth Amendment is accepted, then all of this Court's precedents are wrong.

An accurate analysis of the mitigating facts of troubled

childhood, good character and chronic mental instability, as found by the Texas Court, supports the Court's conclusion that the jury could not fully consider and give effect to the evidence under the special issues. Under the first special issue, Mr. Gribble's mitigating evidence was either irrelevant to the jury's inquiry, see Franklin v. Lynaugh, 487 U.S. 164, 101 L.Ed.2d 155 (1988), or had relevance beyond its scope, as in Penry. Like Penry's mental retardation, Mr. Gribble's troubled childhood and chronic mental instability may have been relevant to whether he was capable of acting "deliberately." Penry, 106 L.Ed.2d at 280-281. Yet, even if a juror considered Mr. Gribble's troubled childhood or chronic mental instability and found that he acted deliberately, that juror could also believe that, based on that same evidence, Mr. Gribble was, nonetheless, less morally culpable that a defendant who had no such excuse.[11]

Under the special issues, that juror had no vehicle to express a reasoned moral response to the evidence of troubled

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[11] Evidence from the guilt/innocence phase, cited to by the State as irrelevant to the jury's punishment phase decision, actually further highlights the jury's dilemma. According to the State, Dr. Silverman testified that Mr. Gribble's "psychotic illness, history of sexual conflicts and difficulty controlling his impulses caused Gribble to act in an 'automated' fashion." Petition at 22. The State contends that because the jury rejected this evidence at the guilt/innocence phase the only way it could consider the evidence at the punishment phase was as residual doubt. This is a specious argument. Indeed, in Penry, the mitigating evidence of mental retardation was introduced at the guilt/innocence phase. See Penry, 106 L.Ed.2d at 271. It is self-evident that although the jury may have found that Mr. Gribble acted intentionally and deliberately, this evidence may have still caused them to believe that he was not morally culpable or deserving of death.

childhood and chronic mental instability. The additional instructions given in this case did not cure the constitutional infirmity of Mr. Gribble's sentence. The definition of deliberately supplied to the jury merely informed it that deliberately was more than intentional. As this Court held in Penry, "Assuming . . . that the jurors in this case understood 'deliberately' to mean something more than that [Mr. Gribble] was guilty of 'intentionally' committing murder, those jurors may still have been unable to give effect to [Gribble's] mitigating evidence in answering special issue one." 106 L.Ed.2d at 280. The alleged mitigation instruction fairs no better as a constitutional matter because it only told the jury to consider the mitigating quality of the evidence as applied to the two special issues. Thus, the jury had no vehicle to express its reasoned moral response to the mitigating evidence outside the scope of the special issues.[12]

This situation is precisely the same one condemned by this Court in Penry: the jury's inquiry into Mr. Gribble's personal moral culpability for his offense was foreclosed once they determined he acted "deliberately." Because "personal culpability is not solely a function of a defendant's capacity to act 'deliberately,'" however, the first special issue precluded

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[12] Because the jury could not give effect to the constitutionally mitigating evidence, it is axiomatic that "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." Boyde, 108 L.Ed.2d at 329.

the jury from considering or giving full mitigating effect to Mr. Gribble's evidence of a troubled childhood and chronic mental instability. Penry, 492 U.S. at ___, 106 L.Ed.2d at 280. As a consequence, there is a constitutionally unacceptable risk that Mr. Gribble received his death sentence "in spite of factors [calling] for a less severe penalty." Penry, 492 U.S. at ___, 106 L.Ed.2d at 281 (citing Lockett, 438 U.S. at 605). See also Eddings, 455 U.S. at 115-119.

Similarly, Mr. Gribble's mitigating evidence of good character, though unquestionably mitigating, was wholly irrelevant to the first special issue question.[13] As the Court anticipated in Franklin, this evidence, like "voluntary service, kindness to others, or religious devotion," was relevant to Mr. Gribble's moral culpability but had nothing to do with the "deliberateness" of his offense. 101 L.Ed.2d at 173. Because of the straightjacket imposed by the first special issue question, the jury's decision whether death was the appropriate punishment for Mr. Gribble could not be informed by this mitigating evidence, in violation of the principles of Lockett, Eddings, Penry, and Boyde.

Mr. Gribble's mitigating evidence could do him no more good under the second special issue. Again, just like Penry's evidence of mental retardation and childhood abuse, Mr. Gribble's evidence of a troubled childhood and chronic mental instability could not be given any mitigating weight under the second

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[13] See also n. 3, supra.

question. See Penry, 492 U.S. at ___, 106 L.Ed.2d at 281. As a consequence of Mr. Gribble's troubled childhood and chronic mental instability a juror could rationally find him "less able than a normal adult to control his impulses or to evaluate the consequences of his actions." Id. Indeed, the Texas Court found that when Mr. Gribble's sexual fantasies became to great too resist he experienced a psychosis in which episodes of violent criminal behavior occurred. Statement of Facts, supra at 2. These qualities compel an attendant finding that Mr. Gribble is likely to be dangerous again in the future -- requiring the jury to return an affirmative answer and the court to impose a sentence of death.[14]

The focus of the second special issue precluded the jury from considering and giving effect to Mr. Gribble's troubled childhood and chronic mental instability as those "compassionate or mitigating factors stemming from the diverse frailties of humankind" which may reasonably support a life sentence. Woodson v. North Carolina, 428 U.S. 286, 304 (1976). Instead, the Texas statute turned these compassionate factors about Mr. Gribble into aggravating factors supporting only a sentence of death. Like Penry's evidence of mental retardation and childhood abuse, Mr. Gribble's evidence of troubled childhood and chronic mental

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[14] The State's only nod to the existence of special issue two is to state, without explanation, that the mitigating evidence was not two edged and could be considered within special issue one. Petition at 22. The State asks too much of this Court to not concede that the jury would find chronic mental instability and psychosis aggravating under the second special issue.

instability was a "two-edged sword:" it "[diminished] his blameworthiness for his crime even as it [indicated a probability] that he [would] be dangerous in the future." Penry, 492 U.S. at ___, 106 L.Ed.2d at 281. Because of the preclusive effect of the Texas statute, only the aggravating "edge" of Mr. Gribble's evidence could be given effect by the jury.[15]

Mr. Gribble's other mitigating evidence, demonstrating his good character, likewise could not be given mitigating weight under the second special issue. These facts about Mr. Gribble's character and background, though constitutionally protected, were not relevant to the jury's determination whether he was likely to commit some criminal act of violence in the future. That is, the fact that others saw Mr. Gribble as stable, sensible, hardworking, polite and generous made him neither more nor less likely to commit criminal acts of violence in the future. As a result, the jurors were forced to ignore this evidence, since they could not use it in any fashion in answering the second special issue question.

The Court of Criminal Appeals correctly concluded that the Texas special issues (even supplemented as they were) precluded the jury from giving any mitigating weight to the evidence of Mr. Gribble's troubled childhood, chronic mental instability and valuable human qualities, and from expressing its reasoned moral

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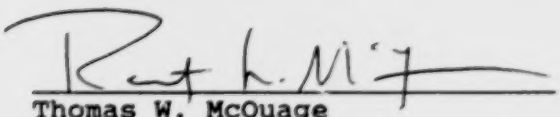
[15] For this reason, the supplemental instruction was of no avail to Mr. Gribble. The additional instruction told the jury to consider the mitigating evidence within the two special issues: the mitigating evidence presented on Mr. Gribble's behalf had only aggravating consequences under special issue two.

response to this evidence in the form of a life sentence. Therefore it was constitutionally necessary to reverse Mr. Gribble's conviction and sentence.

CONCLUSION

For the foregoing reasons this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX A

the reasonable expectation that death would result." Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Sutherlin v. State, 682 S.W.2d 546 (Tex. Cr. App. 1984); DeGarmo v. State, 691 S.W.2d 657 (Tex. Cr. App. 1985); and Lane v. State, 743 S.W.2d 617 (Tex. Cr. App. 1987).

The State would submit that the burden of proof has been more than adequately met. Appellant's thirteenth point of error is without merit and should be denied.

REPLY TO POINTS OF ERROR NUMBERS FOURTEEN, FIFTEEN, SIXTEEN, SEVENTEEN, AND EIGHTEEN RESTATED

THE DISTRICT COURT CORRECTLY REFUSED TO SUBMIT THE INSTRUCTIONS OR SPECIAL ISSUES REQUESTED BY APPELLANT AS TO MITIGATING EVIDENCE.

Appellant complains that the Court should have submitted to the jury one or more of the four instructions and one special issue which he requested. Here are the instructions and special issue requested by the Appellant:

> I would further specifically request that instructions be given to the following effects:
>
> Number one, "You are instructed that any evidence which, in your opinion, mitigates against the imposition of the death penalty, including any aspect of the Defendant's character, or record, or any mental illness, and to any of the circumstances of the commission if the offense, may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the special issues is yes, and in the event such evidence does cause you to have a reasonable doubt, you should answer the issue no," which I believe differs somewhat from the instruction the Court has now giving with regard to mitigating evidence.
>
> I believe the Court, in this charge, has instructed the Jury they may include any evidence with regard to the Defendant's character, or record, or circumstances of the offense that they find--to the extent that evidence causes them to have a reasonable doubt as to a particular issue and that they may then answer that issue no, and I believe that's different from the instruction that I just stated.
>
> I would further request the following additional issues to be given, or instructions.
>
> "An answer of no may be given to any of the special issues if at least ten jurors find that mitigating factors

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against the imposition of the death penalty exist, either in regard to any aspect of the Defendant's character, or record, any mental illness, or in regard to any of the circumstances of the commission of the offense, or if evidence of any such mitigating factors causes at least ten jurors to have a reasonable doubt as to whether the true ansver to the issues is yes."

I would further request the following instruction, "You are instructed you may ansver any of the special issues no if you find any aspect of the Defendant's character, or record, or any mental illness, or any of the circumstances of the offense, as factors which mitigate against the imposition of the death penalty."

I would further request an instruction that, "You are instructed that you may ansver special issue number one no if you find any aspect of the character, or record, or any mental illness, or any of the circumstances of the offense, as factors which mitigate against the imposition of the death penalty."

I would also request an instruction which states, "You are instructed that you may ansver special issue number two no if you find any aspect of the Defendant's character, or record, or any mental illness, or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty."

I would also request an instruction that says something to the effect that, "You are instructed that you may consider evidence of the Defendant's mental illness, if any--"

Well, strike that. Let me--an instruction that would say, "If you find from the evidence of Defendant's mental illness, if any, independent of any relevance that such mental illness has to either of the special issues, that such evidence creates a reasonable doubt as to whether the death penalty is appropriate for this Defendant, due to such mental illness, if any, then you will ansver special issues one--either special issue number one or two no."

I guess I would also incorporate in that same instruction that, "If ten of the jurors would find such evidence of mental illness mitigates against the imposition of the death penalty independent of the relevance of that evidence to the special issues, that they would then, in turn, ansver special issues number one or two--and two, or either one of them no."

And I guess I would also add to that, "Regardless of what they feel like the ansver to those special issues should, in fact, be."

And then in that same light I would request, I guess, a third interrogatory which asks them, "Do you find," or I guess something that--"Do you find, or do you have a reasonable doubt, due to any evidence of Defendant's mental illness, if any, that the death penalty should not be imposed on this Defendant." (Vol.XXVI, pgs.1416-1419).

It is obvious from the arguments made at trial and on appeal that Appellant is attempting to drag the present case into line with the United States Supreme Court's decision in Penry v. Lynaugh,_____ U.S. _____, 109 S.Ct. 2934, 106 L.Ed 2d 256 (1989). The United States would submit that even though Appellant's brief deals only with Penry issues, point of error fourteen, fifteen, and possibly sixteen, do not even give rise to a Penry claim. After Appellant's objections to the jury charge on punishment, the Court submitted the following instruction:

> In making these decisions, you are instructed that you can consider any evidence which, in your opinion, mitigates against an answer of "yes" to each issue, including any aspects of the defendant's character, history, or mental illness, if any, and any of the circumstances of the commission of this offense which you find to be mitigating. And such evidence causes you to have a reasonable doubt as to any issue, you are required to answer that issue "no". (Vol.III, pg.223).

However, since Appellant has only dealt with Penry issues in his brief, the State will counter the arguments presented.

Appellant elicited two types of evidence at trial that could conceivably be termed mitigating. The first type was in the nature of character evidence. This was elicited from a former employer at the guilt/innocence stage (Vol.XX, pg.159), and at the punishment stage from a parade of witnesses ranging from relatives, to acquaintances, to a former teacher. (Vol.XXV, pg.1120 - Vol.XXVI, pg 1289). As Appellant correctly points out, those witnesses generally testified that Appellant was a good worker and a seemingly nice guy. (Appellant's Brief, pgs.59 and 60).

The other type of evidence that Appellant presents as mitigating is testimony from the various relatives referred to above about Appellant's upbringing, and testimony about his mental condition from a psychiatrist (Vol.

XXIII, pgs.719-793), and a psychoanalyst (Vol. XXVI, pgs. 1289-1354).

Appellant argues, of course, that the Supreme Court's decision in Penry, supra, dictates a reversal in the present case. The State urges that Penry (a bare 5-4 majority) should be read narrowly.

The issue in Penry was whether the jury could, within the framework of Article 37.071 of the Code of Criminal Procedure, give a life sentence instead of the death penalty for some reason apart from the yes or no decisions to be made in answering the special issues. Therefore, it is important to realize that there are two aspects to the concept of mitigation when making a Penry analysis:

1. Are the mitigating factors (if any) such that they can be fully taken into consideration in answering the special issues?

2. Are the mitigating factors such that they should be given consideration in sparing the defendant's life even though the rational answer to both special issues is "Yes"?

As this Court recognized in Pierce v. State, 777 S.W.2d 418 (Tex. Crim. App. 1989):

> "The central issue in Penry is whether there was mitigation evidence before the jury that could not be given consideration within the existing framework of the special issues."

Obviously, in Penry the five justice majority in the Supreme Court felt that the mitigating factors fell into the second category listed above. However, the State would contend that mitigating factors in the present case are so different, and so much less compelling than those in Penry, that the case falls into the first category.

First, let's examine the positive mitigating factors in this case. The defense managed to find relatives, acquaintance, former employers, and a former teacher who were willing to testify that the Appellant seemed like a nice enough guy to them and he worked pretty hard. This is a very common strategy during the

punishment phase in a criminal trial. These opinions, like the evidence pertaining to the sole mitigation argument in Franklin v. Lynaugh, 487 U.S. ____, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), related directly to the second special issue and do not appear to have an independent significance. Unfortunately for Appellant, the aggravating factors relating to the second special issue, including evidence of three prior sexual assaults, (Vol.XXIV, pgs 931-971 and 1007-1058), must have seemed stronger to the jury than the character evidence he was able to tender.

The other types of mitigating evidence discussed in Penry were the negative factors. In Penry these were somewhat overwhelming. Penry was a mentally retarded 22 year-old with organic brain damage. This damage could have been caused by trauma at birth or by the severe beatings to the head he suffered at the hands of his mother. His IQ was tested at various times as being in the range of 50 to 63. At a young age he was routinely locked in his room without access to a toilet for long periods of time. At the time of the crime he had a mental age of 6 1/2 and could barely print his name.

Appellant argues that his negative mitigating factors are analogous to those presented in Penry, and, therefore, the jury should have been given an opportunity to give a life sentence over and above answering the special issues. An examination of the record shows that claim to be ludicrous. What negative mitigating factors were offered were such that they could be considered within the framework of the special issues.

At the punishment hearing Appellant had various family members testify about his childhood. Appellant correctly points out that the testimony referred to a strained marriage between his parents, divorce, and living with other relatives at times. (Appellant's Brief, pg.60). Although these facts are not ideal, they

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are certainly not that unusual. They are a long way away from the maltreatment and physical abuse suffered by Penry. The State would submit that these factors can be considered in evaluating the two special issues and do not warrant additional instructions or special issues.

The other negative mitigating evidence came from two expert witnesses called by Appellant. Dr. Seth Silverman, a psychiatrist, testified during guilt/innocence. (Vol.XXIII, pgs.719-793). The doctor interviewed Appellant one time for approximately one hour. (Vol.XXIII, pg.768). Other than that he reviewed some materials provided by the defense and the results of some psychological tests. (Vol.XXIII, pgs. 726 and 727). The gist of the doctor's testimony was in regard to Appellant's intent to murder Elizabeth Jones. He stated that possibly Appellant did not intend to do so. (Vol. XXIII, pg. 757). Although Dr. Silverman had spent almost no time with the Appellant, he opined that he (Appellant) had a "psychotic illness" and had difficulty controlling his impulses. (Vol.XXIII, pg.90).

The State would submit that Dr. Silverman's testimony, if given credence by the jury, (they certainly must not have given much weight to his testimony on intent), would be considered in answering the deliberateness issue in the first special issue. (One of the problems the Supreme Court found in Penry was the trial courts failure to define "deliberate" in the jury charge. It was defined in this case. [Vol.III, pg.223]). If the jury felt that this "psychotic illness" and these uncontrollable impulses negated the deliberateness of the murder, they had the opportunity to answer the first special issue "No." The mitigating factors to which Dr. Silverman testified did not warrant any additional jury charges or special issues.

The final defense witness to testify to negative mitigating circumstances

was Professor William Winslade, a psychoanalyst. (Winslade is referred to on page 61 of Appellant's Brief as a psychiatrist--he is not.) Ironically, one of the first things Winslade had to say was this:

> ...one should be very cautions about believing what psychiatrists, psychologists, and psychoanalysts say about human behavior, because a lot of times people that testify in trial, like this one, sometimes don't know what they are talking about.
>
> Q. Okay. And what about--do you take a particular viewpoint, for instance, to psychiatrist's and psychologist's ability to determine what a person's state of mind was at a particular time?
>
> A. Yes. I, particularly, in that book, try to argue that it is very difficult to know what was going on in a person's mind at a particular moment in time when they were performing an act, often in a very stressful situation. So I revieved a number of cases, murder trials in detail to see it there was really any good evidence that psychiatrists could know, and concluded that there wasn't very good evidence, in many of the cases. (Vol. XXVI, pgs.1292 and 1293).

Winslade testified that he intervieved Appellant over approximately 5 1/2 hours. He hazarded a guess that Appellant had a serious mental illness. However, he candidly stated that he wasn't real confident of that opinion because he hadn't had the opportunity to do a complete evaluation. (Vol.XXVI, pg.1314). A little later he opines:

> A. I think he suffers from severe mental illness related to his sexual behavior, and to his probable depression, but I don't have any evidence of that. (Vol.XXVI, pg.1317).

Finally, Witness Winslade testified to Appellant's I.Q.:

> Q. In regard to his I.Q., W.A.I.S. test that he administered? What were his findings?
>
> A. Do you want me to read it to you? I mean I can read what he says. I didn't evaluate his testing or score. With psychological testing or score. With psychological testing the problem is--
>
> Q. I am asking what his findings are in that regard.

A. I had a verbal I.Q. of 102 and performance I.Q. of 107, whatever that means.

Q. And where did he fall into the various ranges of intelligence?

A. Average range of intelligence. (Vol. XXVI, pg.1336)

Once again the State would argue that this "evidence," whatever it's worth, (the witness himself doesn't seem too sure), could be considered within the framework of the first special issue--no additional instructions or special issues are necessary.

In his brief Appellant argues:

> In Penry v. Lynaugh, supra, the petitioner argued that he was sentenced to death in violation of the 8th amendment because in light of the instructions given to the jury, the jury was unable to fully consider and give effect to the mitigating evidence of his mental retardation and abused background, which he offered as the basis for a sentence less than death. Penry v. Lynaugh, supra, slip op. at 9. On the basis of the record made in this case, the Defendant here adopts precisely that argument. (Appellant's Brief, pg.62)

The State can hardly blame Appellant for seeking to adopt "precisely that argument" that overturned Penry. Unfortunately, his mitigating factors just do not fall into the same category. Penry was mentally retarded and was severely physically abused as a child. Here, Appellant had a less that ideal childhood and may or may not be psychotic, facts that are hardly as compelling as Penry's.

The State would argue that Penry is a narrow decision. The marginal nature of the mitigating factors in the present case do not put it in the same category with Penry. These types of factors fit easily--just as they always have--into the jury's deliberations on the two special issues which were submitted in this case.

Appellant's points of error fourteen, fifteen, sixteen, seventeen, and eighteen are without merit and should be denied.

APPENDIX B

Engrossed

FILE

ENGROSSED

72 91

By: Montford S.B. No. 880

A BILL TO BE ENTITLED

AN ACT

relating to sentencing procedures in capital cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 37.071, Code of Criminal Procedure, is amended to read as follows:

Art. 37.071. PROCEDURE IN CAPITAL CASE. (a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or the defendant's [his] counsel shall be permitted to present argument for or against sentence of death. The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues

submitted under Subsection (c) or (e) of this article.

(b) On conclusion of the presentation of the evidence, the court shall submit the following [three] issues to the jury:

~~(1) [whether--the-conduct-of-the-defendant-that-caused the-death-of-the-deceased-was-committed-deliberately-and--with--the reasonable--expectation--that--the-death-of-the-deceased-or-another would-result;~~

~~[(2)]~~ whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken

~~[(3)--if-raised-by-the-evidence,-whether-the-conduct-of the-defendant-in-killing-the-deceased-was-unreasonable-in--response to-the-provocation,-if-any,-by-the-deceased]~~.

(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.

(d) The court shall charge the jury that:

(1) in deliberating on the issues submitted under

Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously[~~,~~] and

[~~(2)~~] it may not answer any issue "no" unless 10 or more jurors agree; and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

(e) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without the possibility of parole rather than a death sentence be imposed.

(f) The court shall charge the jury that in answering the

issue submitted under Subsection (e) of this article, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;

(3) need not agree on what particular evidence supports an affirmative finding on the issue; and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) of this article and a negative finding on an issue submitted under Subsection (e) of this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) of this article or an affirmative finding on an issue submitted under Subsection (e) of this article or is unable to answer any issue submitted under Subsection (b) or (e) of this article, the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice [Corrections] for life without the possibility of parole.

~~[(f) If a defendant is convicted of an offense under Section 19.03(a)(6), Penal Code, the court shall submit the three issues under Subsection (b) of this article only with regard to the conduct of the defendant in murdering the deceased individual first~~

named in the indictment.

[(g) The court, the attorney for the state, or the attorney for the defendant may not inform a juror or a prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.]

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals [within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals].

SECTION 2. Subsections (b) and (c), Article 44.29, Code of Criminal Procedure, are amended to read as follows:

(b) If the court of appeals or the Court of Criminal Appeals awards a new trial to a [the] defendant other than a defendant convicted of an offense under Section 19.03, Penal Code, only on the basis of an error or errors made in the punishment stage of the trial, the cause shall stand as it would have stood in case the new trial had been granted by the court below, except that the court shall commence the new trial as if a finding of guilt had been returned and proceed to the punishment stage of the trial under Subsection (b), Section 2, Article 37.07, of this code. If the defendant elects, the court shall empanel a jury for the sentencing

stage of the trial in the same manner as a jury is empaneled by the court for other trials before the court. At the new trial, the court shall allow both the state and the defendant to introduce evidence to show the circumstances of the offense and other evidence as permitted by Section 3 of Article 37.07 of this code.

(c) If any court sets aside or invalidates the sentence of a defendant convicted of an offense under Section 19.03, Penal Code, and sentenced to death on the basis of any error affecting punishment only, the court shall not set the conviction aside but rather shall commence a new punishment hearing under Article 37.071 of this code as if a finding of guilt had been returned. The court shall empanel a jury for the sentencing stage of the trial in the same manner as a jury is to be empaneled by the court in other trials before the court for offenses under Section 19.03, Penal Code [~~This section does not apply to convictions under Section 19.03 of the Penal Code. In such cases, the cause shall stand as it would have stood in case the new trial had been granted by the court below~~].

SECTION 3. Article 44.251, Code of Criminal Procedure, is amended to read as follows:

Art. 44.251. REFORMATION OF SENTENCE IN CAPITAL CASE. (a) The court of criminal appeals shall reform a sentence of death to a sentence of confinement in the institutional division of the Texas Department of Criminal Justice [Corrections] for life without the possibility of parole if[~~:~~

[~~(4)~~] the court finds that there is insufficient evidence to support an affirmative answer to an issue submitted to the jury under Article 37.071(b) or a negative answer to an issue submitted to a jury under Article 37.071(e) of this code.

(b) The court of criminal appeals shall reform a sentence of death to a sentence of confinement in the institutional division of the Texas Department of Criminal Justice for life without the possibility of parole if:

(1) the court finds reversible error that affects the punishment stage of the trial other than a finding of insufficient evidence under Subsection (a) of this article; and

(2) within 30 [~~45~~] days after the date on which the opinion is handed down, the date the court disposes of a timely request for rehearing, or the date that the United States Supreme Court disposes of a timely filed petition for writ of certiorari, whichever date is later, the prosecuting attorney files a motion requesting that the sentence be reformed to confinement for life without the possibility of parole.

(c) If the court of criminal appeals finds reversible error that affects the punishment stage of the trial only, as described by Subsection (b) of this article, and the prosecuting attorney does not file a motion for reformation of sentence in the period described by that subsection, the defendant shall receive a new sentencing trial in the manner required by Article 44.29(c) of this code.

SECTION 4. Subsection (b), Section 12.31, Penal Code, is amended to read as follows:

(b) Prospective jurors shall be informed that a sentence of life imprisonment <u>without the possibility of parole</u> or death is mandatory on conviction of a capital felony. ~~[A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.]~~

SECTION 5. The change in law made by this Act, except as provided in Section 7 of this Act, applies to sentencing procedures in capital trials that occur on or after the effective date of this Act, whether the trials are for offenses committed before, on, or after the effective date of this Act and whether the procedures are part of the original trial of the offense, an award of a new trial for both the guilt or innocence stage and the punishment stage of the trial, or an award of a new trial only for the punishment stage of the trial.

SECTION 6. Subsection (b), Section 8, Article 42.18, Code of Criminal Procedure, is amended to read as follows:

(b) A prisoner under sentence of death is not eligible for parole. <u>A prisoner under sentence of life under Section 19.03, Penal Code, is not eligible for release on parole.</u> If a prisoner is serving a sentence for the offenses listed in Subdivision (1), Subsection (a), Section 3g, Article 42.12 of this code, or if the judgment contains an affirmative finding under Subdivision (2) of

Subsection (a) of Section 3g of that article, he is not eligible for release on parole until his actual calendar time served, without consideration of good conduct time, equals one-fourth of the maximum sentence or 15 calendar years, whichever is less, but in no event shall he be eligible for release on parole in less than two calendar years. All other prisoners shall be eligible for release on parole when their calendar time served plus good conduct time equals one-fourth of the maximum sentence imposed or 15 years, whichever is less.

SECTION 7. The change in law made by Section 6 of this Act applies for offenses committed after September 1, 1991.

SECTION 8. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF TEXAS
Petitioner,

v.

TIMOTHY LANE GRIBBLE
Respondent.

CERTIFICATE OF SERVICE

I, Robert L. McGlasson, a member of the Bar of this Court, hereby certify that all parties required to be served have been served, and that a copy of Mr. Williams' Petition for Writ of Certiorari in the above-captioned case was mailed, first class postage prepaid, to counsel for Petitioner:

Office of the Attorney General
State of Texas
P. O. Box 12548
Austin, Texas 78711-2548

Criminal District Attorney
Galveston County
405 County Courthouse
Galveston, TX 77550

This 3d day of June, 1991.

Robert L. McGlasson